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No. 90-1487

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THREE BUOYS HOUSEBOAT VACATIONS U.S.A., LTD.,
Petitioner,

vs.

HARVEY G. MORTS, et al.,
Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Authorities	ii
Statement of the Case	1
Summary of the Argument	2
Argument	2
Conclusion	10

TABLE OF AUTHORITIES

Page

Cases:

Adams v. Montana Power Co., 528 F.2d 437 (9th Cir. 1975) 6

Butler v. Boston & Savannah Steamship Co., 130 U.S. 527 (1889) 4,6

Chapman v. United States, 575 F.2d 147 (7th Cir. ____) (en banc) 6

Economy Light & Power Co. v. United States, 256 U.S. 113 (1920) 9

Finneseth v. Carter, 712 F.2d 1041 (6th Cir. 1983) 6,7,9

Franchise Transport v. Construction Laborers' Vacation Trust, 463 U.S. 1 (1983) 3

George v. Beavark, Inc., 402 F.2d 977 (8th Cir. 1968) 8

Hartman v. United States, 522 F. Supp. 114 (D.S.C. 1981) 8

In matter of Stephens, 341 F. Supp. 1404 (N.D. Ga. 1965) 7

In matter of Sisson, 867 F.2d 341 (7th Cir. 1989) 3

In re Builders' Supply Co., 278 F. Supp. 254 (M.D. Iowa 1968) 3

In re Hauser's Petition, 227 F. Supp. 81 (W.D.N.C. 1964) 3

In re Madsen's Petition, 187 F. Supp. 411 (N.D.N.Y. 1960) 3,10

Kaiser Aetna v. United States, 444 U.S. 164 (1979) 7,9

Lewis Charters, Inc. v. Hawkins Yacht Corp., 871 F.2d 1046 (11th Cir. 1988) 3

Loc-Wood & Motor v. Rockwell, 245 F.2d 306 (8th Cir. 1957) 8

Lord v. Goodall, Nelson & Perkins Steamship Co., 102 U.S. 541 (1881) 5,6

Maryland Casualty Co. v. Cushing, 347 U.S. 407 (1954) 6

Marroni v. Matey, 492 F. Supp. 340 (E.D. Pa. 1980) ... 3,5

Nelson v. Leland, 63 U.S. 48 (1860) 8

Oseredzuk v. Warner Co., 354 F. Supp. 453 (E.D. Pa. 1972) 7

Peak v. United States, 353 U.S. 43 (1957) 10

Perry v. Haines, 191 U.S. 17 (1903) 7

Petition of Liebler, 19 F. Supp. 829 (W.D.N.Y. 1937) 5

Propeller Gennesee v. Fitzhugh, 12 How 443 (1852) ... 7,9

Reynolds v. Bradley, 644 F. Supp. 42 (N.D.N.Y. 1986) 7

Richardson v. Harman, 222 U.S. 96 (1911) 4,5

Sanders v. Placid Oil Co., 861 F.2d 1374 (5th Cir. 1988) 8

Sawczyk v. United States Coast Guard, 499 F. Supp. 1034 (W.D.N.Y. 1980) 8

Sisson v. Ruby, 497 U.S. ___, 111 L.Ed.2d 29 (1990) 2,3,7

Wickard v. Filburn, 317 U.S. 111 (1942) 5

CONSTITUTIONAL PROVISIONS:

Article I, Section 8, Clause 3 5

STATUTES AND REGULATIONS:

28 U.S.C. Section 1333 2

46 U.S.C. Section 183 *et seq.* ..... *passim*

46 U.S.C. Section 740 4,6

Rule 12(b)(6), Fed. R. Civ. P. 8

33 C.F.R. Section 329.4 9

TREATISE:

J. Nowak, R. Rotunda, J. Young, *Constitutional Law* (2d ed., 1983) 5

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STATEMENT OF CASE

On August 2, 1987, a 20-foot speed boat operated by an employee of Petitioner collided with a houseboat anchored on the Lake of the Ozarks. Appendix at p. A-27 (Subsequent references to the Appendix will be by page number only.) This collision killed two people and injured others. A-27.

The Lake of the Ozarks, impounded by the Bagnell Dam, lies entirely within the State of Missouri. A-12; A-27. No vessel on the Lake of the Ozarks can navigate across the state line. Nonetheless, Petitioner seeks to limit is liability to $250.00

pursuant to the federal Limitation of Liability Act (Limitation Act). 46 U.S.C. Section 183 et seq.

SUMMARY OF THE ARGUMENT

A Writ of Certiorari should not be granted because the controlling principles in this case are well-established. Landlocked, intrastate bodies of water are beyond the admiralty jurisdiction of federal courts. 28 U.S.C. Section 1333. The possibility of an independent basis for federal jurisdiction over claims under the Limitation Act is moot because the coverage of that Act is coextensive with the scope of admiralty jurisdiction.

ARGUMENT

Petitioner has attempted to create the appearance of turbulence in the calm waters surrounding the facet of admiralty law involved in this case. Two well-settled principles of admiralty law support the Eighth Circuit's determination that neither maritime jurisdiction in general nor the Limitation Act in particular applies to a landlocked body of water located entirely within a single state. First, the existence of admiralty jurisdiction is essential to a valid claim under the Limitation Act. Second, admiralty jurisdiction and, hence, the Limitation Act do not extend to landlocked, intrastate waterways. Analysis of these controlling principles demonstrates that any appearance of controversy created by Petitioner is either false or at least far removed from the non-controversial issues presented by this case.

I. Admiralty jurisdiction is essential to Limitation Act claims.

The exclusive jurisdictional basis for Limitation Act claims is the admiralty jurisdiction of the Federal Courts pursuant to 28 U.S.C. Section 1333. In *Sisson v. Ruby*, 497 U.S. ___, 111 L.Ed.2d

292, 297-298 n.1 (9190), this Court found no need to decide whether there might be an independent basis for federal question jurisdiction over such claims, since, in that case, admiralty jurisdiction did exist. However, three Circuit Courts of Appeal which have considered the issue have all refused to recognize an independent jurisdictional basis for Limitation Act claims. *Three Buoys*, at A-8; *Lewis Charters, Inc. v. Hawkins Yacht Corp.*, 871 F.2d 1046 (11th Cir. 1989); *In the matter of Sisson*, 867 F.2d 341, 348-49 (7th Cir. 1989), *rev'd on other grounds* in *Sisson v. Ruby, supra*.[1] Citing *Franchise Transport v. Construction Laborers' Vacation Trust*, 463 U.S. 1 (1983), the Eighth Circuit concluded that there is no federal question jurisdiction over Limitation Act claims because such claims do not "arise under" the Limitation Act, which is in the nature of a federal defense. *Three Buoys* at A-8.

At any rate, as emphasized by the Eighth Circuit, the possibility of a non-admiralty basis for federal question jurisdiction over Limitation Act claims is purely academic in view of other Supreme Court precedent. A-8. This Court has stated that the reach of the Limitation Act is coterminous with the scope of admiralty jurisdiction:

> "It being clear, then, that the law of limited liability of ship owners is a part of our Maritime Code, the extent of its territorial operation . . . cannot be doubtful. It is necessarily *coextensive with* that of the general admiralty and maritime jurisdiction . . ."

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[1] The few District Courts which have considered the issue have generally reached the same conclusion, i.e., that 28 U.S.C. Section 1333 provides the exclusive jurisdictional basis for Limitation Act claims. *Marroni v. Matey*, 492 F. Supp. 340, 343 (E.D. Pa. 1980); *In re Builders' Supply Co.*, 278 F. Supp. 254, 256-57 (M.D. Iowa 1968); *In re Houser's Petition*, 227 F. Supp. 81, 85-86 (W.D.N.C. 1964); *In re Madsen's Petition*, 187 F. Supp. 411, 413-14 (N.D.N.Y. 1960).

Butler v. Boston & Savannah Steamship Co., 130 U.S. 527, 557 (1889) (emphasis supplied). Thus, even if there were some non-admiralty basis for federal question jurisdiction of Limitation Act claims, those claims would be beyond the scope of the Limitation Act and thus subject to dismissal under Rule 12(b)(6), Fed. R. Civ. P. *Three Buoys*, at A-19. The dearth of cases even addressing the possibility of federal question jurisdiction over Limitation Act claims reflects the mootness of this issue.

Contrary to Petitioner's contention, *Richardson v. Harmon*, 222 U.S. 96 (1911), did not permanently uncouple the reach of the Limitation Act from the scope of admiralty jurisdiction. While *Richardson* broadened the type of liability subject to exoneration under a comparable limitation law[2] to include damage to land as well as damage at sea, *Richardson* did not eliminate the fundamental requirement that the damage-causing vessel be located on navigable water. At most, *Richardson* temporarily disconnected the scope of the Limitation Act from the restrictive version of the locality test for admiralty jurisdiction in effect at that time, which placed damage to land beyond the scope of admiralty jurisdiction. 222 U.S. at 101.

Congress has long since realigned the Limitation Act with the scope of admiralty jurisdiction by expressly extending federal maritime jurisdiction to "include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land . . ." 46 U.S.C. Section 740 (enacted in 1948). This statutory extension of admiralty jurisdiction in effect codified the holding in *Richardson*. The reach of the Limitation Act, therefore, remains coextensive with the scope of admiralty

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[2] The Limitation Act involved in *Richardson*, while not identical to the statute in the present case, was construed as being "*in pari materia* with [the original version of the Limitation Act at issue in the present case] . . ." *Richardson*, 222 U.S. 103.

jurisdiction, as enlarged by 46 U.S.C. Section 740. The present case, involving an alleged tort which caused damage on water, rather than land, certainly provides no meaningful opportunity for reconsideration of the *Richardson* decision.

Petitioner's suggestion that the Limitation Act expressly applies to all waterways regardless of their navigability is similarly meritless. The Eighth Circuit correctly concluded that the purpose of the 1886 amendment of Section 188 was simply to increase the range of vessels within the coverage of the Limitation Act, and not to extend the scope of the Act beyond navigable interstate waters. *Three Buoys*, at A-20; *Accord, e.g., Marroni, supra*, 492 F. Supp. at 343; *Petition of Liebler*, 19 F. Supp. 829, 832 (W.D.N.Y. 1937).

Finally, Petitioner incorrectly argues that the scope of the Limitation Act is as sweeping as Congress' regulatory authority under the Commerce Clause of the U. S. Constitution, Art. I, Sec. 8, Cl. 3, to regulate interstate activities affecting interstate commerce. This argument confuses the broad constitutional authority for congressional enactment of the Limitation Act with the limited degree of authority which Congress actually chose to exercise via that Act. The Commerce Clause supplied constitutional authority for Congress to regulate interstate commerce by limiting vessel owners' liability. *Lord v. Goodall, Nelson & Perkins Steamship Co.*, 102 U.S. 541 (1881). There is, however, no authority for the proposition that Congress intended the Limitation Act to apply beyond the confines of admiralty jurisdiction.

The relatively contemporary interpretation of the Commerce Clause as warranting federal regulation of internal state affairs which "affect" interstate commerce was not widely accepted until long after the enactment of the original Limitation Act. *See, e.g., Wickard v. Filburn*, 317 U.S. 111, 1942); *see generally* J. Nowak, R. Rotunda, & J. Young, *Constitutional Law* (2d ed.)

146-66 (1983). The *Lord* case reflects the extremely limited view of congressional Commerce Power in vogue at the time of the Limitation Act's passage. *Lord* stressed that the Limitation Act was a constitutional exercise of Congress' Commerce Power because it did "not relate to the purely internal commerce of a [single] state . . ." 102 U.S. at 545.

It is, therefore, anachronistic to suggest that Congress passed the original Limitation Act in 1851 with the intention that the Act be applied to waterways which were not considered within the reach of the congressional Commerce Power until nearly a century later. It is no more plausible that Congress later came to intend that the Limitation Act exceed its original scope. *See Maryland Casualty Co. v. Cushing*, 347 U.S. 409 437 (1954) (Black, J., dissenting) (criticizing the Limitation Act as based on outmoded notions regarding the shipping industry and discouraging expansive interpretation of the Act). Petitioner has thus succeeded only in showing that the Limitation Act applies to all types of liability (46 U.S.C. Section 740) incurred by all types of vessels (46 U.S.C. Section 188) within the modern concept of admiralty jurisdiction. However, notwithstanding the breadth of the Limitations Act within the confines of admiralty jurisdiction, the reach of the Act remains circumscribed by the parameters of admiralty jurisdiction. *Butler, supra,* 130 U.S. at 557.

II. Admiralty jurisdiction does not extend to landlocked, intrastate bodies of water.

Other Circuit Courts of Appeal which have addressed the issue have, like the Eighth Circuit, concluded that admiralty jurisdiction does not apply to landlocked, intrastate waterways. *Chapman v. United States*, 575 F.2d 147 (7th Cir.) (en banc), *cert. denied*, 439 U.S. 393, and *Adams v. Montana Power Co.*, 528 F.2d 437 (9th Cir. 1975) (both holding that reservoirs created by lockless dams wholly within a single state were not subject to federal admiralty jurisdiction); *see also Finneseth v. Carter*, 712

F.2d 1041, 1044-46 (6th Cir. 1983) (citing both *Chapman* and *Adams* with approval).[3] Such bodies of water do not satisfy "the threshold requirement" of admiralty jurisdiction: "that the water body be available as an interstate highway of commerce . . ." *Finneseth*, 712 F.2d at 1044. Landlocked waterways are not considered navigable for admiralty purposes, even if they are suitable for intrastate commerce, because by definition, they cannot support *interstate* traffic. *Id.*

Cases decided by this Court also clearly indicate that admiralty jurisdiction does not apply to landlocked waterways. The Court has observed that the term "navigability" arises in a variety of contexts and that care must be taken to consider the term in reference to the purpose for which it is being used. *Kaiser Aetna v. United States*, 444 U.S. 164, 171 (1979). The purpose of federal admiralty jurisdiction is to protect maritime commerce by establishing uniform rules of conduct for all navigable waterways and a uniform mode of administering those rules. *Sisson*, 497 U.S. at ____, 111 L.Ed.2d at 299; *Propeller Gennesee v. Fitzhugh*, 12 How. 443, 454 (1852). The basic rationale for admiralty jurisdiction applies with equal force to U.S. coastal waters and to inland interstate waters. *Propeller Gennesee*, 12 How. at 455. Similarly, an intrastate waterway may fall within the federal courts' admiralty jurisdiction if, by connecting with other interstate waters, it forms a continuous highway for the transportation of interstate commerce. *E.g., Perry v. Haines*, 191 U.S. 17 (1903). However, no such purpose would be served by extending admiralty jurisdiction to landlocked intrastate waters,

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[3] District Courts have also generally concluded that admiralty jurisdiction does not extend to intrastate bodies of water. *E.g., Reynolds v. Bradley*, 644 F. Supp. 42 (N.D.N.Y 1986); *Oseredzuk v. Warner Co.*, 354 F. Supp. 453 (E.D. Pa. 1972), *cert. denied* in 415 U.S. 977; *In the matter of Stephens*, 341 F. Supp. 1404 (N.D. Ga. 1965).

which are by definition physically incapable of sustaining interstate commerce. *See Nelson v. Leland*, 63 U.S. 48, 56 (1860) (admiralty jurisdiction "applies to all navigable waters *except to a commerce exclusively within [a single] State.*") (emphasis supplied).

With the exception of the two Eighth Circuit cases now disavowed or at least discredited by that Court,[4] none of the cases cited by Petitioner holds or even implies that admiralty jurisdiction extends to landlocked, intrastate waterways such as Lake of the Ozarks. The waterways involved in each of the cases on which Petitioner relies were, in fact, interstate or part of a continuous waterway for the transportation of interstate commerce. *Sanders v. Placid Oil Co.*, 861 F.2d 1374, 1378 (5th Cir. 1988) (Lake Catahoula, in conjunction with connection rivers, formed "a continuous highway between states over which commerce can be conducted."); *Hartman v. United States*, 522 F. Supp. 114, 116-17 (D.S.C. 1981) ("Lake Wylie is an interstate body of water, comprising a portion of the border between the two Carolinas."); *Sawczyk v. U. S. Coast Guard*, 490 F. Supp. 1034, 1039 (W.D.N.Y. 1980) ("The Niagra River . . . forms an international boundary between the United States and Canada along its entire length of about 36 miles."). The issue in these cases was whether the concededly interstate bodies of water

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[4] These cases are *George v. Beavark, Inc.*, 402 F.2d 977 (8th Cir. 1968) and *Loc-Wood Boat & Motors v. Rockwell*, 245 F.2d 306, 307 (8th Cir. 1957). Both suggest that the construction of a lockless dam confining formerly interstate water to a single state does not remove that waterway from the ambit of admiralty jurisdiction. *George*, 402 F.2d at 978; *Loc-Wood*, 245 F.2d at 307. In *Three Buoys*, the Eighth Circuit distinguished *George* on the grounds that any such implication was mere dictum in that case. *Three Buoys* at A-6. The Eighth Circuit expressly overruled *Loc-Wood*, which had held that the Lake of the Ozarks continued to be navigable after construction of the Bagnell Dam. *Id.*, at A-7.

involved were navigable in the sense of being capable of sustaining commercial traffic. *Id.* No such issue arises in the present case since the Lake of the Ozarks fails the "threshold" test for maritime navigability: it simply is not interstate water. *Finneseth, supra*, 712 F.2d at 1044.

Petitioner's contention that the Lake of the Ozarks remains within admiralty jurisdiction merely because it once formed part of the interstate Osage River is altogether unconvincing. Historical navigability is immaterial to admiralty jurisdiction's purpose of promoting interstate commerce through the establishment of uniform rules for interstate and international waters. *Kaiser Aetna, supra*, 444 U.S. at 171; *see also Sisson, supra*, 111 L.Ed.2d at 299; *Propeller Gennessee, supra*, 12 How. at 459. Extending admiralty jurisdiction to the indefinitely landlocked waters of the Lake of the Ozarks would contribute absolutely nothing to the uniformity of rules of conduct and procedure applicable to waterways available for interstate and international commerce. The Eighth Circuit, therefore, properly focused on the long-standing non-navigability of the Lake of the Ozarks, rather than the Lake's history as part of the interstate Osage River.[5]

Concentrating on the current non-navigablity of landlocked waterways such as the Lake of the Ozarks will not require overly

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[5] The retained Federal authority over the Lake of the Ozarks derives from Congress' Commerce Power, rather than admiralty jurisdiction. The Commerce Clause permits Congress to regulate formerly interstate waterways which may regain their interstate status. *Economy Light and Power Co. v. United States*, 256 U.S. 113 (1920); *see also* 33 C.F.R. Section 329.4 (granting the Army Corps of Engineers authority over "navigable waters," including "those waters that . . . have been used in the past . . . to transport interstate or foreign commerce . . ."). However, for the reasons discussed in the text, the Federal government's retention of regulatory authority over landlocked waterways does not mean that those waterways remain subject to admiralty jurisdiction.

fact-intensive analysis, as Petitioner suggests. As noted by one Court, determination that intrastate waterways are beyond the scope of admiralty jurisdiction requires little more than "common sense." *In re Madsen's Petition*, 187 F. Supp. 411, 414 (N.D.N.Y. 1960) (citing *Peak v. United States*, 353 U.S. 43, 46, for the observation that "common sense often makes good law.") In the present case, the Eighth Circuit applied both common sense and good law by holding that Federal law does not severely curtail the State remedies available to Missouri residents injured through the allegedly tortious conduct of a Missouri corporation on a body of water located entirely within the State of Missouri.

CONCLUSION

For all of the foregoing reasons, Respondents request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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